

**CALIFORNIA GAMBLING CONTROL COMMISSION RESPONSE TO TRIBAL  
TASK FORCE REPRESENTATIVES FINAL REPORT STATEMENT OF NEED  
RE: CGCC-8, DATED FEBRUARY 13, 2008.**

**April 23, 2008**

**INTRODUCTION**

On February 13, 2008, the State Gaming Agency (SGA) Association and Task Force representatives to the Association and Task Force meetings at which CGCC-8 was discussed were presented with a copy of the report entitled, "Association Regulatory Standards Taskforce Final Report Statement of Need Re: CGCC-8, February 13, 2008" (Report). While the SGA representatives provided verbal input regarding the matters covered in the Report during the Association and Task Force meetings involving CGCC-8, the actual drafting of the Report was accomplished by Tribal Task Force representatives and their counsel. Accordingly, this Response is intended to provide the Association with the views of the California Gambling Control Commission (Commission, CGCC) regarding the Report's assertions and to provide the Commission's position with regard to the issues discussed in the Report, including the Statement of Need. The headings below and their content respond to the headings and content in the Report.

At the outset, the Commission wishes to acknowledge the hard work and professionalism of the Tribal Task Force participants. CGCC-8 prompted an unprecedented response from tribal representatives and the sheer number of Task Force participants made the process arduous. Nevertheless, in spite of strongly held feelings about many aspects of CGCC-8, all parties acquitted themselves with professionalism. This Response is made in the same spirit.

**STATEMENT OF NEED**

The Draft Statement of Need alluded to the CRIT decision and its effect on oversight of Tribal Gaming by the NIGC. While the Commission continues to believe that the decision did indeed leave a void in independent, non-tribal oversight of Tribal Gaming regulation, in response to widespread disagreement with that assertion and in response to language suggested by the Rumsey Rancheria, the Commission modified the Statement and the Purpose section of CGCC-8 (CGCC-8 section (a)) to reflect the other aspect of the need and purpose of the regulation: to provide an effective and uniform manner in which the SGA can conduct the compliance reviews contemplated in Compact Sections 7.4 and 7.4.4. The reviews include assuring Tribal (and TGA) compliance with the requirements of Compact Sections 6.1 and 8.1 – 8.1.14.

We agree with the Report that the CRIT decision does not and cannot change the terms of the Tribal-State Gaming Compact (Compact). However, we disagree that CGCC-8 attempts to amend the terms of the Compact. For reasons expressed in more detail in the section on Legal Authority, we believe the adoption of CGCC-8 is well within the Commission's authority, as provided in the Compact.

Moreover, while we agree with the repeated assertions of Tribal representatives that the NIGC MICS remain the applicable standards for tribal gaming operations in California, we reiterate that including the NIGC MICS as a baseline in CGCC-8 fosters the uniformity goals expressed in Compact Section 8.4 and facilitates the SGA's exercise of its compliance authority and responsibility found in Section 7 of the Compact. We also are constrained to point out that CGCC-8 does *not* require any tribe to adopt the NIGC MICS in carrying out its responsibilities under Sections 6 and 8. CGCC-8 requires that whatever MICS a Tribe may choose to adopt meet or exceed the requirements of the NIGC MICS. Further, CGCC-8 provides for variances (CGCC-8 section (l)) and for consultation between the SGA and individual tribes and the Association as a whole regarding the effect of changing technology on compliance matters (CGCC-8 section (m)).

Finally, we disagree with the Report's assertion that CGCC-8 provides for financial audits by the state. No such language was included in the draft upon which the Report was based and, in response to concerns raised by a number of Tribes, the version of CGCC-8 approved by the CGCC (March 27, 2008) for consideration by the Association contains specific language eschewing such authority. (CGCC-8 section (h).)

### **ECONOMIC IMPACT**

First, as outlined above, the Commission reiterates that CGCC-8 has not and does not provide for an annual financial audit by the SGA.

Second, while any outside review must entail the use of some gaming operation staff resources, the SGA is dedicated to working with individual TGA's to minimize the impact of compliance reviews. We believe that through consultation with Tribal regulators on a case-by-case basis, the impact that such compliance reviews may have on individual gaming operations will be minimized. We are acutely aware that our ability to efficiently conduct meaningful compliance reviews depends to a large extent on the cooperation of individual TGA's and gaming operation personnel.

### **APPLICATION TO CARDROOMS**

As stated in more detail below, the State's authority to promulgate CGCC-8 is found in the Compact. When the 1999 Compact was signed, the California Gambling Control Commission was not even in existence. For a number of

years, the Commission's staffing levels were minimal and its focus with regard to regulations applicable to cardrooms was on the licensing process. Extensive regulations have been developed regarding licensing of owners, and key employees; work permits for other employees, registration of manufacturers and distributors, third party providers, the discipline process, emergency preparedness and evacuation, and responsible gambling; in addition to accounting and financial reporting regulations. Included in regulations currently pending in the formal Administrative Procedure Act rulemaking process are regulations pertaining to MICS for check cashing, extension of credit, automatic teller machines and abandoned property. MICS for drop and count procedures, cage requirements, security, and surveillance have been proposed to the cardroom industry in informal comment sessions and are pending the formal process. The Bureau of Gambling Control also has regulations regarding cardroom operation and the game authorization process.

The assertion that CGCC-8 represents a "discriminatory" approach to gaming regulations by the CGCC is unfounded. Commission and Bureau of Gambling Control cardroom regulations run some 130 pages, not including forms. The extent of the State's authority over cardrooms as demonstrated in the Gambling Control Act and the Discipline regulations compared to the division of authority between sovereign signatories to the Compact presents a stark comparison. Moreover, in contrast to the Report's assertions, CGCC-8 neither ignores the fact that California tribes follow the NIGC MICS – that assumption was implicit in the development of CGCC-8 – nor does the Commission "not respect the ability of tribal gaming agencies to enforce such standards." CGCC-8 is not discriminatory. It is an exercise of the State's compliance overview authority found in the Compact. The Compact is clear in providing that the SGA may inspect the gaming operation and associated documents to assure compliance with the Compact.

### **FOSTERING UNIFORMITY**

The Report incorrectly conflates Tribal (and TGA) use of the NIGC MICS in carrying out regulatory responsibilities under the Compact with SGA review of Compact compliance. The Commission does not dispute the Report's assertion that gaming tribes played a major role in the development of the NIGC MICS, nor does the Commission dispute the Report's assertion that the NIGC MICS are the standard for California gaming tribes. On the contrary, those assertions were essential to the Commission decision to adopt the NIGC MICS as a baseline or bench mark for compliance review. The selection of a benchmark already employed by California's gaming tribes was seen as a way of avoiding arbitrariness in compliance reviews. The Commission reasoned that if Tribes in developing their own MICS used the NIGC MICS as a baseline, the use of the same baseline by the SGA assured uniformity of review and consistency with the uniformity goals of Compact Section 8.4.

CGCC-8 does not require any Tribe to adopt the NIGC MICS. Nor does it seek to amend the Compact. The Compact sets out the areas for which Tribes and TGA's must develop internal controls and must ensure the gaming operation is run pursuant to those controls. (See Sections 6.1, 8.1 – 8.1.14.) CGCC-8 does not seek to expand, nor by its terms does it expand those Compact terms. It sets a benchmark for compliance review, a benchmark that the Tribes have repeatedly asserted they already use, and thus the industry standard for tribal gaming in California. Further, it is a benchmark that explicitly takes into consideration the size and scope of the gaming operation.

### **ALTERNATIVES TO CGCC-8**

From the Commission's perspective, Compact negotiations are not called for because the SGA's compliance review authority is clearly established in the existing Compact. While individual agreements could accomplish the same purpose, a uniform regulation adopted in accordance with the Compact provisions specifically authorizing such regulations seems much more efficacious. It ensures uniformity and fairness in SGA compliance review and, by taking into account the scope of individual gaming operations, assures a level playing field for all tribes.

Tribal Task Force members also proposed alternative language that contemplated either waiting for new federal authority for the NIGC or eliminating SGA compliance review via CGCC-8 if the Tribe and the NIGC agreed to NIGC oversight through either MOU/MOA's or changes to Tribal gaming ordinances. Neither of these approaches takes into account the State's sovereignty as a signatory to the Compact. The State/SGA authority to inspect the gaming facility and all gaming operation or facility records relating thereto (Section 7.4) and the SGA's authority to be granted access to papers, books, records, equipment or places where such access is reasonably necessary to ensure compliance with the Compact (Section 7.4.4) are derived from the Compact. They are not and cannot be made dependent upon the statutory authority of the NIGC, or upon other arrangements between the NIGC and individual tribes.

Both the Tribe and the State are sovereigns. Each has sovereignty the other must respect; each has the right to demand that the other sovereign comply with its responsibilities and obligations mutually agreed to in the Compact.

### **ALTERNATIVE LANGUAGE TO CGCC-8**

As the report indicates, there were two alternate language proposals submitted. However, the Commission representatives were repeatedly and pointedly reminded at Task Force meetings that neither of these proposals was agreed to by the tribal regulatory Task Force members as a group and that there were a number of Tribes whose opposition to CGCC-8 would not be changed by language changes. Nevertheless, the Commission adopted language from each

proposal. Much of the Purpose section of CGCC-8 (section (a)) is taken from the Rumsey proposal and the language in CGCC-8 section (f) regarding Agreed Upon Procedures Audits comes from the Attorney Work Group Proposal. Further, both the Attorney Work Group and Rumsey proposals adopt the NIGC MICS as a benchmark.

With regard to language inserting binding arbitration into the dispute resolution process, it has been the Commission's position that CGCC-8 derives its authority from the Compact and therefore, the dispute resolution process in CGCC-8 should follow that found in the Compact.

### **LEGAL AUTHORITY**

It is the position of the Commission, as it has been throughout this process, that legal authority for CGCC-8 is firmly grounded in the Compact.

First, as a general proposition, the State, like the Tribe, has the right under the Compact to demand that the other signatory comply with the terms of the Compact. In fact, each signatory has waived sovereign immunity with regard to matters of Compact compliance. (See Sections 9.4 and 11.2.1(c).)

Second, Sections 8.4 and 8.4.1 clearly contemplate that the SGA may pass regulations regarding the Tribe's gaming operations in order to foster statewide uniformity of regulation of Class III gaming operations. Section 8.4 provides:

“In order to foster statewide uniformity of regulation of Class III gaming operations throughout the state, rules, regulations, standards, specifications, and procedures of the Tribal Gaming Agency in respect to any matter encompassed by Sections 6.0, 7.0, or 8.0 shall be consistent with regulations adopted by the State Gaming Agency in accordance with Section 8.4.1.”

CGCC-8 is clearly such a regulation. It does not, as arguably it could, require the TGA to make its “rules, regulations, standards, specifications, and procedures regarding matters encompassed by Sections 6.0, 7.0, or 8.0 . . . consistent with regulations adopted by the State Gaming Agency.” (Section 8.4.1.) Instead, it establishes as a benchmark the industry standard for MICS, the NIGC MICS. It does not purport to require Tribes to adopt the NIGC MICS in whole or in part, (though throughout this process we have been repeatedly told that tribes have already adopted the NIGC MICS) but instead requires that whatever MICS each TGA adopts be equal to or more stringent than the NIGC MICS. The NIGC MICS were chosen as a benchmark because the Commission was repeatedly assured by gaming tribes that it was both the industry standard and the MICS of choice for California gaming tribes.

CGCC-8 does not purport to usurp the primary role of TGA's in establishing and enforcing tribal MICS. CGCC-8 establishes guidelines and procedures for the SGA in exercising its authority under Sections 7.4 and 7.4.4 to independently ensure that the TGA's are carrying out their responsibilities under the Compact; in short, to ensure compliance with the Compact. Indeed, Compact Section 7.4 makes clear that notwithstanding the primary regulation and enforcement role of the TGA, the SGA may inspect the Tribe's gaming facility and gaming operation or facility records with regard to Class III gaming, subject to conditions outlined in Sections 7.4.1 through 7.4.3:

“Notwithstanding that the Tribe has the primary responsibility to administer and enforce the regulatory requirements of this Compact, the State Gaming Agency shall have the right to inspect the Tribe's Gaming Facility with respect to Class III Gaming Activities only, and all Gaming Operation or Facility records relating thereto . . . “

Further Section 7.4.4 makes clear the SGA's broad right of access to documents, equipment and facilities:

“Notwithstanding any other provision of this Compact, the State Gaming Agency shall not be denied access to papers, books, records, equipment or places where such access is reasonably necessary to ensure compliance with this Compact.”

Thus, it is clear that the SGA may promulgate regulations in respect to matters encompassed by Sections 6.0, 7.0 and 8.0 in order to foster statewide uniformity of regulation of Class III gaming operations throughout the state. Further, it is clear that notwithstanding that the Tribe's have primary responsibility for administering and enforcing the Compact's regulatory requirements, the SGA has the right to inspect the Gaming Facility and Gaming Operation or Facility records and, notwithstanding any other provision of the Compact, the SGA is to be allowed access to papers, equipment and places where such access is reasonably necessary to ensure compliance with the Compact.

CGCC-8 is a regulation authorized under Section 8.4 to ensure uniformity in the regulation of matters encompassed by Sections 6.0, 7.0 and 8.0. It is an exercise of the SGA's authority under Sections 7.4, 7.4.4, 8.4 and 8.4.1 of the Compact. Thus it is not an “amendment” of the Compact nor does it change the terms of the Compact. It is not, by its language or intent, an attempt to limit or reduce the primary role of the TGA in the regulation and enforcement of Class III gaming.

### **DUPLICATIVE**

The Report points to the Governor Schwarzenegger's letter of March 30, 2007 to the Senate Committee on Indian Affairs, quoting the governor as follows:

“[California’s] approach with the compacts and state oversight of internal controls has been to complement, rather than duplicate NIGC’s activities.”

CGCC-8 is not, as the Report asserts, “entirely inconsistent” with the Governor’s message to the Committee. In fact, it is not at all inconsistent. As has been made clear at the Task Force meetings and as Chairman Shelton has made clear at the March 27, 2008 Commission meeting, the CGCC has and will continue to make every effort to coordinate with the NIGC. However, SGA compliance reviews are not duplicative of NIGC reviews; they are a legitimate exercise of the State’s authority under the Compact. As NIGC Chairman Philip Hogen’s April 17, 2008 written testimony to the Senate Indian Affairs Committee Oversight Hearing Committee indicated: “To put the regulation of tribal gaming in proper context, we need to appreciate that the vast majority of the regulation of tribal gaming is done by the tribes themselves, with their tribal gaming commissions and regulatory authorities. In many instances, where tribes conduct Class III or casino gaming, state regulators also participate in the [regulatory] process. NIGC has a discrete role to play in this process and is only one partner in a team of regulators.” The SGA focus is Compact compliance; the NIGC has no interest in, nor authority with regard to Compact compliance. Further, to assert that because the NIGC has an oversight role with regard to internal controls the State should forbear from exercising its compliance review authority under the Compact is to ignore the State’s role as a sovereign Compact signatory.

The fact that tribes have already put into place standards “at least as stringent as NIGC MICS” does not make CGCC-8 duplicative. Nor does the fact that a number of Tribes have changed their gaming ordinances or entered into agreements purporting to grant the NIGC “authority” to monitor and enforce tribal compliance with those standards. The loss of such authority as a result of the CRIT decision brought focus on the need for State compliance oversight. The authority for such oversight has always existed in the Compact.

Finally, the Report’s assertion that CGCC-8 contemplates financial audits such as those found at 25 U.S.C. section 2710(b)(2)(C) is unfounded. The Commission has consistently indicated that CGCC-8 was not designed to facilitate such audits, and language added to the March 2, 2008 version of CGCC-8 (CGCC-8, paragraph (h)) makes that explicit.

As stated on many occasions, the Compact provides the State with the authority (and responsibility) to review tribal standards to ensure compliance with the Compact. Neither tribal regulatory activities, nor NIGC regulatory activities displace or substitute for such State compliance reviews.

## **RECOMMENDATION**

The Commission is well aware of the widespread and persistent opposition to the proposed CGCC-8 among many Task Force and Association members. Nevertheless, we ask that you re-consider these positions.

As we have stated on many occasions during this process, the Commission expects that the vast majority of gaming tribes have standards in place and run their gaming operation according to those standards in compliance with the Compact. However, that does not alter the State's clear authority to conduct compliance reviews. Further, from the perspective of the SGA, the State not only has the authority to conduct compliance reviews, but the responsibility as well. The public as well as the legislative and executive branches of state government have made that clear. CGCC-8 simply outlines a process and sets a uniform benchmark for such reviews. It does not arrogate to the State any authority not already found in the Compact. It does not prescribe specific standards. Rather, it sets a uniform benchmark for such standards; a benchmark that the Report asserts the tribes already employ.

The Commission fully realizes that any on-site review takes time and resources on the part of the tribal gaming operation and is fully committed to working with tribes to accomplish these reviews in the most efficient manner possible. Additionally, the Commission realizes that the efficacy of such reviews is dependent in large part on the cooperation of the tribes.

CGCC-8 is respectful of tribal sovereignty. It does not purport, nor does its language suggest, an intent to infringe on the primary regulatory role of the TGA. It establishes a process and benchmark designed to foster statewide uniformity of regulation of Class III gaming while at the same time recognizing individual tribal sovereignty and wide-ranging differences in the size and scope of gaming operations.